

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

MCI, INC. COMMENTS

MCI, Inc. (MCI) respectfully submits these comments pursuant to the Federal Communications Commission's (FCC or Commission) Public Notices (DA 04-3835 and DA 04-3836), in the above referenced docket, putting forth for comment the Petitions for Declaratory Ruling filed by Consumer Bankers Association (CBA) on November 19, 2004.¹ The Commission should grant CBA's motion and clarify that the provisions of the Indiana Revised Statutes and Indiana Administrative Code ("Indiana laws") and the Wisconsin Statutes and Wisconsin Administrative Code ("Wisconsin laws") relating to telemarketing, as applied to interstate calls, are preempted.

On July 3, 2003 the Commission issued an Order that revised and adopted new telemarketing rules pursuant to the Telephone Consumer Protection Act of 1991 (TCPA). The Commission's rules prohibit a person or entity from initiating a "telephone solicitation" to a residential subscriber who has registered his or her number on the national do-not-call registry of persons who do not wish to receive telephone

¹ Public Notices, Federal Communications Commission, DA 04-3835 and DA 04-3836, CG Docket No. 04-208 released December 7, 2004.

solicitations.² The Commission’s rules and the TCPA itself exclude calls pursuant to an established business relationship from the term “telephone solicitations,” and thereby exclude those calls from the rules governing the do-not-call registry. The Commission defined the term “established business relationship” (EBR) as follows:

“[A] prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber’s purchase or transaction with the entity within the eighteen (18) months immediately proceeding the date of the telephone call or on the basis of the subscriber’s inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.”³

The subscriber’s EBR with a seller extends to an affiliated entity if the subscriber would reasonably expect them to be included given the nature and type of goods or services offered and the identity of the affiliate.⁴

The TCPA provides States the authority to enforce the *federal* do-not-call rules,⁵ but limits their authority to impose additional State requirements to intrastate calls.⁶ As the Commission stated in its *2003 TCPA Order*,

² 47 CFR § 64.1200(c)(2).

³ 47 CFR §64.1200(f)(3).

⁴ 47 CFR §64.1200(f)(3)(ii).

⁵ “Authority of States. – Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive \$500 in damages for each violation, or both such actions . . .” Section 227(f)(1).

⁶ State law not preempted – Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations

“[a]lthough section 227(e) gives states authority to impose more restrictive intrastate regulations, [the Commission] believe[s] that it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. [The Commission] concludes that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion.”⁷

As the Commission further states, “the record in [the TCPA] proceeding supports the finding that application of inconsistent rules for those that telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities.”⁸

The Wisconsin and Indiana telemarketing laws substantially conflict with the Commission’s telemarketing rules by prohibiting telemarketing calls to persons with which the caller has an established business relationship as defined in the FCC rules. Therefore, the Commission should explicitly state that, with regard to application of the rules to interstate calls, these rules are preempted by the federal rules. As the Commission concluded, the ability of sellers to contact those with whom they have EBR is not only an important aspect of their business plan, it provides consumers valuable information regarding products or services that they may have purchased from the company.⁹ In response to those opposed to the EBR exemption, the Commission pointed out that a seller is not permitted to call a consumer that is on that seller’s company do-

prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements or regulations on, or which prohibits...the making of telephone solicitations. Section 227(e)(1)(emphasis added).

⁷ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, CG Docket No. 02-278, FCC 03-153, para. 83 (2003)(“2003 TCPA Order”).

⁸ *Id.*

⁹ 2003 TCPA Order, para. 42.

not-call list regardless of whether there exist an EBR.¹⁰ The Commission expressly found that “this determination constitutes a reasonable balance between the interests of consumers that may object to such calls with the interests of sellers in contacting their consumers.”¹¹

Moreover, the Commission specifically considered and addressed the issues raised in these petitions, specifically whether a past inquiry, previous purchases or transactions, company affiliation, or the purchase of related products and services of the seller is sufficient to establish an EBR.¹² The Commission found that an inquiry by a consumer is a basis for an EBR if the response to such inquiry occurs within a reasonable time, in particular three (3) months preceding the call. Prohibiting a company from providing information sought by a consumer would frustrate that customer’s wishes. The Commission also determined that an eighteen (18) month period from the time of last payment or transaction for the existence of an EBR strikes the appropriate balance between industry practices and consumer’s privacy interests. Additionally, the Commission found that affiliates fall under the EBR if based on consumer’s reasonable expectations of which companies will call them. This is important in the telecommunications industry where many related products are sold under the same company or brand name but provided by various affiliates. A rule denying affiliates an EBR with the consumer could deny consumers information on cost saving company plans. The Commission also found that restricting the EBR by product or service could

¹⁰ TCPA Order, para. 43.

¹¹ *Id.*

¹² TCPA, para. 110 and paras. 113-117.

interfere with the company's ability to market, particularly since many companies market products and services in packages.¹³

Because the Indiana and Wisconsin laws disrupt the balance reached by the Commission in formulating the definition of "established business relationship," the Commission should grant CBA's petitions and explicitly state that those laws are preempted to the extent they prohibit telemarketing calls to persons with which the caller has an EBR as defined by the Commission's rules.

Respectfully submitted,

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¹³ TCPA Order, para. 116.